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In The
Supreme Court of The United States
October Term 1998

CURTIS McDONALD and
ALICE MARIE JOHNSON
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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1-088

QUESTIONS PRESENTED

1. Did the government violate 18 U.S.C. Section 201(c)(2) by offering leniency to cooperating accomplices who testified at trial; does 18 U.S.C. Section 201(c)(2) apply to the government, considering the statute broadly defines the word "whoever;" was the Sixth Circuit Court's failure to apply the statute to the government a direct contravention of this Court's holding in *Nardone v. United States*, 302 U.S. 379 (1937); and does the application of the statute to everyone except the government constitute a violation of equal protection under Fifth Amendment Due Process?

2. Was the failure of the Trial Judge to recuse a violation of Fifth Amendment Due Process?

PARTIES TO THE PROCEEDING

The Petitioner Curtis McDonald is an individual formerly residing in Memphis, Tennessee, now incarcerated for life as a result of this conviction and in custody in a federal institution.

The Petitioner Alice Marie Johnson is an individual formerly residing in Memphis, Tennessee, now incarcerated for life as a result of this conviction and in custody in a federal institution.

Respondent is the United States Government.

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Petitioners, Curtis McDonald and Alice Marie Johnson, petition for a writ of certiorari to review the March 1, 1999, Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed the judgment entered by the United States District Court for the Western District of Tennessee entered in the District Court as a result of a jury verdict finding each guilty of conspiracy and other crimes. Curtis McDonald was sentenced to life imprisonment under the Guidelines. Alice Marie Johnson was also sentenced to life imprisonment under the Guidelines.

OPINION BELOW

The Opinion of the Sixth Circuit in *United States v. Curtis McDonald, Alice Johnson, Jerlean McNeil, Marcus Lopez, and Milton Valencia*, March 1, 1999, was not reported.

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment in *United States v. Curtis McDonald, Alice Johnson, Jerlean McNeil, Marcus Lopez, and Milton Valencia*, *supra*, on March 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Since this appeal involves an issue which is virtually identical to an issue in *United States v. Ware*, 161 F.3d 414 (6th Cir. 1998), *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998),

and *United States v. Haese*, 162 F.3d 359 (5th Cir. 1998), this petition brings to the attention of this Court those decisions but distinguishes the facts in those cases as the facts herein are even more outrageous. See *infra*.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

18 United States Code, Section 201 (Appendix D) is relevant to this petition. It states in pertinent part:

> Section 201. Bribery of public officials and witnesses
>
> (c) Whoever...
>
> (2) directly or indirectly, gives, offers of promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom, shall be fined under this title or imprisoned for not more than two years, or both.

Also relevant is the Fifth Amendment Due Process Clause. See Appendix C.

STATEMENT OF THE CASE

The district court had jurisdiction over this case pursuant to 18 U.S.C. Section 3231, which provides that "[t]he district courts of the United States shall have original jurisdiction ... of all offenses against the law of the United States." Petitioner Curtis McDonald and Petitioner Alice Johnson and others were convicted in 1997 by a jury of conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. Section 846 and 841(a)(1). Curtis McDonald received a term of life imprisonment. Alice Marie Johnson also received a term of life imprisonment. Each filed an appeal to the Sixth Circuit, raising numerous issues. During the pendency of the appeal, the Tenth Circuit issued *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). A three judge panel held that 18 U.S.C. § 201(c)(2) applied to government prosecutors, and suppressed the statements of a witness who had entered into an agreement with the government to testify in exchange for leniency. Because of the ruling of *Singleton*, *supra*, the Petitioners in the present case sought permission in the Sixth Circuit to supplement briefs and raise the issue, since cooperating accomplice-government witnesses testified against them. A motion to supplement original briefs was filed and the Sixth Circuit granted the motion by Order filed August 11, 1998. Oral argument was heard and the Sixth Circuit then issued its opinion on March 1, 1999 (Appendix A), sustaining the

government's argument that 18 U.S.C. § 201(c)(2) does not apply to any agreement entered into by the government with a testifying witness in exchange for a promise of leniency and also ruling against Petitioners as to all of the other issues. Petition for Rehearing and Suggestion for Rehearing En Banc was filed and denied April 13, 1999. Appendix B.

ARGUMENT
REASONS FOR GRANTING THIS PETITION

FIRST ISSUE
VIOLATION OF 18 U.S.C. § 201(c)2)

Under Rule 10, this petition should be granted since it presents an important question of statutory interpretation that concerns all district and circuit courts and involves the most important question in federal criminal law today. Despite the en banc reversal of *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) AND THE HOLDING OF *United States v. Haese*, 162 F.3d 359 (5th Cir. 1998) and *United States v. Ware*, 161 F.3d 414 (6th Cir. 1998), Petitioner insists that the *contra* view that this statute indeed applies to government attorneys or agents [of *United States v. Fraguela*, 1998 WL 560352 (E.D. La. 8-27-98) and *United States v. Lowery*, 1998 (WL 493818 (S.D. Fla. 1998)] is the better view. Indeed, the facts herein are more outrageous than in *Singleton*, *Ware*, or *Haese*. We know of no reported case

where the accomplice testimony of cooperating criminals is so untrustworthy.

This decision of the Sixth Circuit below against ignores the plain language of 18 U.S.C. § 201(c)(2): the federal anti-bribery statute is designed to prevent *all parties or entities* from exchanging leniency for testimony at trial or hearing!! Petitioner submits the Sixth Circuit has also rendered a decision that is contrary with a decision of this Court; and has so far departed from the usual and customary interpretation of the anti-gratuity statute, that it creates one set of rules for government attorneys, and one set of rules for the remainder of the federal bar.!!

THE LONG HABIT

Thomas Paine, sparkplug of the American Revolution, said it best in 1776: "the long habit of doing something wrong gives it the superficial appearance of being right." Consider the holding of *Haese* (Fifth Circuit) *supra*, at pp.366-368, which we say violates this sacred concept:

> Section 201(c)(2) prohibits the giving, offering or promising anything of value to a witness for or because of his testimony. Haese relies upon *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) *reh'g en banc granted, opinion vacated* (10th Cir. July 10, 1998). In *Singleton*, the court found that the prosecutor violated § 201(c)(2) and reversed

> the defendant's conviction based upon an accomplice's testimony at trial under a cooperation agreement. *Id.* at 1359-61. The accomplice agreed to testify truthfully in return for leniency, including the possibility of a 5K1.1 motion by the government. *Id.* at 1344. This Circuit, however, has rejected the applicability of the *Singleton* court's holding. *United States v. Webster*, 162 F.3d 308, 356-58 (5th Cir. 1998). "[T]his circuit's precedents shows ... that we consistently have upheld government efforts to provide benefits to witnesses in exchange for testimony... ." *Id.* In addition, no other jurisdiction has adopted *Singleton*, and even the Tenth Circuit vacated the decision pending rehearing *en banc*.

This Circuit, once again, refuses to adopt *Singleton*'s reasoning and holding. This Court has stated that "no practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988). The First Circuit has correctly noted that frequently the most knowledgeable witnesses available to testify about criminal

activity are other co-conspirators. *United States v. Daily*, 759 F.2d 192, 196 (1st Cir. 1985); see *United States v. Reid*, 19 F.Supp.2d 534, 537 (E.D. Va. 1998). Often, there are situations where these individuals are the only credible witnesses, and without the ability to use their testimony the government would not be able to obtain a conviction. *Id.* Moreover, this essential "right on the part of the prosecutor to make promises of leniency in exchange for testimony is as old as the institution of the criminal trial." *Id.* In addition, affording leniency to cooperating accomplices dates back to the common law of England and has been recognized and approved by the United States Congress, the United States Courts and the United States Sentencing Commission. *United States v. Barbaro*, 1998 WL 556152 at n3 (S.D.N.Y. Sept. 1, 1998); see also *United States v. Laureano*, 1998 WL 696006 at n1 (S.D.N.Y. Oct. 7, 1998).

Unlike the *Singleton* court, it is evident to this Court that Congress did not intend for section 201(c)(2) to be used when prosecutors offer lenity for a witness' truthful testimony. To interpret section 201(c)(2) in any other way would apply shackles to the government in its pursuit to enforce the law. See *United States v. Hammer*, 25 F.Supp.2d 518, 535-36 (M.D.Pa. 1998) (noting that the *Singleton* opinion makes a criminal out of nearly every federal prosecutor, accomplices out of district judges, suppresses highly relevant evidence and cripples the enforcement of federal criminal law).

Two courts have followed *Singleton*'s flawed rationale, *United States v. Fraguela*, 1998 WL 560352, at n2 (E.D.La. Aug. 27, 1998) (concluding that section 201(c)(2) "does and should apply to prosecution plea bargaining") *United States v. Lowery*, 15 F.Supp.2d 1348, 1359-60 (S.D. Fla.1998) (finding that suppression of co-defendant's testimony is the appropriate remedy for a violation of section 201(c)(2) and to deter unlawful prosecutorial conduct). These courts are incorrect and this Circuit will not follow down a path that will throw our criminal system into disarray.

Although *Fraguela* and *Lowery* were misguided by the *Singleton* court, numerous courts dealing with the application of section 201(c)(2) have refused to accept its rationale. To apply section 201(c)(2) to the government in this case is "unsound, not to mention nonsensical, especially in its creation ex nihilo of an exclusionary rule barring testimony from virtually every cooperating federal witness. *Eisenhardt*, 10 F.Supp.2d at 521. Therefore, we must reject Haese's contention that 18 U.S.C. § 201(c)(2) is violated when testimony is obtained in exchange for a favorable plea agreement. Thus, we hold that the district court did not err in allowing Assomull's testimony. (footnotes omitted).

This practice is wrong -- dead wrong -- and criminal. "The long habit" does not make it *right* or *lawful*.

The Sixth Circuit Court of Appeals Decision Is In Conflict With This Court's Statutory Interpretation Jurisprudence

This Court has consistently noted that the task of analyzing a statute must begin with its plain language. "The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409 (1993) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (internal quotation marks omitted); see also *Estate of Cowart v. Nicklos Drilling Company*, 505 U.S. 469, 476 (1992) (referring to "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written").

In the present case, Congress has clearly provided that the anti-gratuity statute found in 18 U.S.C. § 201(c)(2) apply to everyone, including government attorneys charged with upholding the laws and other interests of the United States, when the statute begins by saying "[w]hoever" to define the perimeters of its audience. Petitioner submits nothing could be clearer and that the plain language used by Congress

shows an intent to apply the statute to *all* persons including the government.

Clearly, the maxim *noscitur a sociis*, "that a word is known by the company it keeps," *Gustafson v. Alloyd Company, Inc.*, 115 S.Ct. 1061, 1069 (1995), shows that the meaning of the word "whoever" should not be limited in regard to its application to prosecutors, and certainly not limited any from the accompanying language in 18 U.S.C. § 201(c)(2). In other words, and contrary to the Circuit Court holdings of *Ware*, *Singleton*, and *Haese*, *supra*, there is nothing in the statute which shows any intention by Congress to exempt federal prosecutors from the prohibitions of the Act.

Likewise, when the statute states that "whoever .. gives, offers, or promises anything of value," Congress is sufficiently specific in its meaning to encompass the promise of leniency or favors that have become so prevalent in our judicial system when the government seeks to compel the testimony of witnesses. In plain language: words mean something! If that is so, then the plain meaning of 18 U.S.C. § 201(c)(2) clearly springs forth to include government prosecutors, however well intentioned they might be, or desirous to ferret out crime in society. There is absolutely nothing unambiguous about the statute in question. As stated many years ago by Thomas Paine, "The long habit of doing something wrong gives it the superficial appearance of being right."

In this case, the Petitioners were found guilty along with others of conspiracy and possession with intent to distribute cocaine. Each petitioner was sentenced to life imprisonment based upon the lies and fabrication of cooperating accomplices induced to lie by violation of 18 U.S.C. § 201(c)(2).

THE PROOF BELOW BEFORE THE JURY

The proof of the government was mainly "cooperating" individuals or informants who ordinarily come in three varieties: (1) anonymous, (2) the citizen, and (3) the criminal milieu. In this case, the source was from the criminal milieu and these, indeed, are persons who are likely to lie and should be presumed unreliable: "It is to be expected that the criminal informer will not infrequently reach for shadowy leads, or even seek to incriminate the innocent." *Jones v. United States*, 266 F.2d 924, 928 (D.C. Cir. 1959) The informer, indeed, has always been associated with tyranny and despotism. Despised in free societies, the informer is the human embodiment of the fear of the iron fist. Free societies treasure privacy, personal loyalty, and the sense of community that flows from loyalty and privacy. In the totalitarian state, there is a war on privacy and the only loyalty permitted is loyalty to the totalitarian state either as a political entity or as a cult of personalities centered around the dictator. Governments, at war with their citizens, acting as always in the name of some socially desirable ends, value

order and stability without regard to the cost of achieving these goals. In the "war against drugs," the informer is just as despised, and should be eyed with suspicion by appellate judges. Indeed, some persons refuse to cooperate with the government due to moral conviction that it is wrong to cooperate and blame others for individual conduct and mistakes regardless of the situation -- and the fact that society is losing the "war against crime."

> Criminals are likely to say or do almost anything to get what they want, especially when what they want is to get out of trouble with the law. It is my personal firsthand experience of over 18 years as a prosecutor, this willingness to do anything, includes... lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come in contact, including -- and especially -- the prosecutor.
>
> Stephen Trott, Assistant Attorney General for the Justice Department (1984)

THE PARADE OF LIARS

"The Truth, The Whole Truth, So Help Me God"

• Merrick Bill Thomas	
• Milton Valencia	
• Jose Alicano	"Scarface"
• Ramon Ramirez	"Fabian"
• Paul Duventre	"The Preacher"
• Garcerial Dotson	"Ted"
• Edward Williams	"Moses"
• Felix Cohens	
• Michael Barnes	
• Kelvin Willis	The Lawyer
• Andre Johnson	"Babe Bro"
• Marcellia Jaramillo	
• Maurice Mondie	
• Marcos Lopez	"Rambo"
• Luis Alberto Gonzalez	"Mike"
• Victoriano Minotta	"Leo"

The government, as stated, relied primarily upon the testimony of numerous "cooperating individuals," names and aliases above [better named "cooperating criminals"] or informants which the defense brands "liars". Each "cooperating individual" had a strong motive to lie: escape punishment. Each faced life in prison -- if the truth were

known. Not one single cooperating individual had any credibility and the government "dangled the carrot" and shook the keys to the prison door, saying, want the door opened? Incriminate! And they did. These were cooperating accomplices that would do anything for reward -- lie, cheat, deceive, kill![1]

More than ten percent of all cases decided since the Federal Sentencing Guidelines became effective have seen a departure for substantial assistance with approximately one-in-five offenders securing such treatment for their cooperation during the last three fiscal years. Fitzgerald[2] *Informant Law Deskbook* (1996). This, of course, does not include "cooperation" in 1997 and 1998. It is suspected that most of these plea bargains violated the witness-tampering statute! [18 U.S.C. § 201(c)(2)] This "bribery" should be halted.

> Common sense would suggest that [an accused accomplice] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still

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1. Government witness Andre Johnson testified that he would in fact kill for $100,000 by hiring someone else to actually "pull the trigger". See TR, TRIAL, Johnson, 10-9-96, Vol. XI, p.2399-2400; APX v.4, p.1516.

2. Fitzgerald is a retired DEA special agent and a former sergeant in the Miami, Florida, police force and is also Associate Director and co-founder of the National Institute for Drug Enforcement Training.

> awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility that one might expect to find in the public at large.

Washington v. Texas, 388 U.S. 14, 22-23 (1967)

"Accomplice plea agreements tend to produce unreliable testimony because they create an incentive for the accomplice to shift blame to the defendant or other co-conspirators. Further, an accomplice may wish to please the prosecutor to ensure lenient prosecution in his own case." *Singleton*, *supra*, *dissent*, at p.9 (quoting *Accomplice Testimony Under Contingent Plea Agreements*, 72 Cornell L.Rev. 800, 802 (1987).

The testimony of the witnesses was crucial to the government's case, and essential in its conviction of the Petitioners. The testimony of these criminal witnesses was the government's only direct link between Petitioner and a purported large supplier of cocaine. But for their testimony, the government's proof that the Petitioners were a major recipient of cocaine was simply reduced to long distance telephone records, hotel bills, and airline receipts. Petitioner submits that had these witnesses been barred from testifying, or the jury informed that the offer of lenience by the

government constituted a separate and indictable criminal offense by the government, then no rational jury would have found them guilty beyond a reasonable doubt.

Does the Circuit Court's Holding Conflict With This Court's Decision In *Nardone v. United States*, 302 U.S. 379 (1937), Concerning Whether 18 U.S.C. § 201(c)(2) Applies To The Government?

The Sixth Circuit cited in its *Ware* opinion, *supra* [cited as authority against Petitioner in the Opinion denying her relief], this Court's decision of *Nardone v. United States*, 302 U.S. 379 (1937), holding that the canons of statutory interpretation express clearly that 18 U.S.C. § 201(c)(2) does not apply to the government attorneys. But the holding expressed in *Nardone*, *supra*, establishes that a criminal statute such as that in the present case should apply to the government, unless Congress specifically exempts it from the language!

In *Nardone*, *supra*, the Court was asked to determine if the provisions of Section 605 of the Communications Act of 1934 applied to the government, who had attempted to use unauthorized intercepted telephone conversations at trial. The district court allowed the testimony, and the circuit court affirmed the conviction. A conviction under the Act was punishable by fine or imprisonment. *Nardone*, at 381.

> The Act provided in part:
> [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; ...

Nardone v. United States, 302 U.S. at 381.

"Taken at face value the phrase 'no person' comprehend federal agents, and the ban on communication to 'any person' bars testimony to the content of an intercepted message." *Nardone, supra*, at 381. "...[T]he plain words of 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that '*no person*' shall divulge or publish the message or its substance to '*any person*'." Nardone, at 382 (emphasis in original). *It seems without question that the phrase "whoever" in 18 U.S.C. § 201(c)(2) deserves the same analysis and plain-meaning interpretations as was afforded in Nardone.*

The Sixth Circuit took great liberties with *Nardone* to justify excluding 18 U.S.C. § 201(c)(2) from governmental application, paraphrasing how it 'would deprive the sovereign of a recognized or established prerogative title or interest,' or simply that application on the government would "create an obvious absurdity." *United States v. Ware*, 161 F.3d at 419

(quoting *Nardone*, *supra*, at 383-384). *Nardone* gave examples of situations where statutes would not apply to the government, although none are applicable to 18 U.S.C. § 201(c)(2).[3]

It seems folly to urge, as did the government in *Ware*, that an Assistant United States Attorney is not an agent of the federal government, but somehow converted to a higher plane wherein he is a reflection of the sovereign. *Id.* at 421. "The rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign." *Nardone*, at 383. The answer to this is no further than the plain rationale of *Nardone*, where the Court recognized and accepted that the government attorney was subject to the statutory proscriptions.

The government also argued in *Ware* that 18 U.S.C. § 201(c)(2) simply does not apply to the government because to do so would impede one of the "principal benefits" in the area of prosecution. "The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers would resort to methods deemed inconsistent with

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3. Nardone gave the "classical instance" of how the state is exempt from operation of the general statutes of limitations. It also emphasized how laws designed to prevent speeding do not apply to the police or fire department during an emergency. Id. at 383-384.

ethical standards and destructive of personal liberty." *Nardone*, at 383.

Did the Circuit Court's Refusal To Apply The Plain Meaning Of 18 U.S.C. § 201(c)(2) To The Government Constitute A Violation Of Equal Protection Under The Due Process Clause?

The government attorneys are subject to the same constraints as are imposed on others subject to the equal protection component of the Due Process Clause of the Fifth Amendment. See, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The Attorney General and United States Attorneys retain "broad discretion" to enforce the nation's criminal laws. *Wayte v. United States*, 470 U.S. 598 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380, n.11 (1982)). They have this latitude because they are designated by statute as the president's delegates to help him discharge his constitutional responsibility to "take care that the Laws be faithfully executed." *U.S. Const.*, Art. II, Section 3; also see, 28 U.S.C. § § 516, 547. However, the duties, functions and discretionary powers imposed on a government prosecutor are indeed "subject to constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

The Circuit Court's holding creates the unworkable and unjust situation wherein the government attorneys are

operating under one set of rules in dealing with the federal criminal code, while the remainder of the federal bar is required to follow another set of rules, namely, that they cease from offering "anything of value" to a witness in exchange for his testimony, or risk the imposition of criminal fines or sanctions.

"Constitution law manifests another vital legal tradition which the government's position undercuts -- the policy of ensuring a level playing field between the government and defendant in a criminal case. The Supreme Court long ago recognized that impartiality in criminal cases requires that '[b]etween [the accused] and the state the scales are to be evenly held.'" *United States v. Singleton*, *supra*, dissent, pp.12-13, *supra*, (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)). The central inquiry and constitutional requirement in any criminal case is whether the "trials are fair." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Petitioner submits that the Sixth Circuit's decision in refusing to apply 18 U.S.C. § 201(c)(2) to the case created an *imbalance* of such constitutional proportion that this Court should on this ground alone grant the petition for certiorari.

RULES OF PROFESSIONAL ETHICS

Another argument recognized by *Singleton*, *supra*, of the Tenth Circuit and other cases is that federal prosecutors as lawyers are bound by state ethics rules in the states where they engage in their duties. State ethics rules function like

rules of criminal procedure: federal prosecutors are ethically barred from obtaining testimony from cooperating accomplices and others by promises of leniency and such testimony is tainted and "inadmissible". See now vacated panel decision in *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) (This argument will be expanded in the brief if this petition is granted.)

SECOND ISSUE
FAILURE TO RECUSE
VIOLATION OF FIFTH AMENDMENT DUE PROCESS

On the morning of the first day of trial, the defendant Alice Johnson (petitioner) realized for the first time that the trial judge's husband was in the law firm that had represented her on several civil matters and to which law firm Alice Johnson had paid considerable money as fees. Defense counsel raised the issue because of the perception of defendant Johnson that such was inappropriate. Quite naturally, her perception and fears were realized in her own mind by the results of this case and the rulings complained of in this brief. Since the emphasis on this issue and others like it is dual - *reality* and *perception of reality* - we submit the Court's ruling was wrong and under the circumstances violates Fifth Amendment Due Process. Until very recent years, criminal lawyers routinely represented more than one client, if there was no *apparent* conflict. Now, it is never done. Judges react in horror and quite properly so to the

appearance of impropriety, and argue with great fervor that each client has the right to counsel and though the lawyers *veracity*, *good intentions*, and *honor* are not questioned, the *appearance* of impropriety rules the day. That's the *goose*. This is the *gander*. It's the same *sauce*.

The Petitioner Johnson will go to her grave (somewhere in a federal prison if this case stands) believing with her last breath that she didn't get a fair shot. The remedy was easy and painless on the first day of trial.

DISQUALIFICATION OF THE TRIAL JUDGE

The trial judge should have disqualified herself before the trial based on the information that her husband's law firm (not he personally) represented in an unrelated civil matter the alleged co-conspirator Alice Johnson (petitioner herein).

A lawyer is bound by ethical considerations in his role as advocate. The judge is bound to act ethically in her role as judge. But the rules pertaining to judicial conduct are different from those pertaining to the conduct of lawyers as advocates. Our adversary system presents two advocates representing clients whose interests have come into conflict. The duty of each is to present her client's case in the strongest light possible, to win, using every legitimate legal method to convince the fact-finder that her client should prevail. DR 7-101

The importance of an impartial and competent "referee" between the two parties is obvious: The Judge must

ensure that the lawyers in their advocacy, do not step beyond what is legally ~~or~~ ethically permissible. Without the presence of an unbiased and competent judge performing this function, one party could gain an unfair advantage. Further, to the extent that the judge has cause to favor one side over the other due to personal interests or biases (rather than the merits of the case), the legitimacy of the entire adversary system is undermined. Even when the judge is not the trier of fact, the slightest hint of bias or prejudgment on her part might unfairly affect the outcome because of the great influence she has with the jury, and the perception is as important as reality, especially the perception of the defendant.

The rules and principles believed to be necessary to promote proper judicial conduct are delineated in the ABA Code of Judicial Conduct [CJC] (adopted in all federal and a number of state courts) and in state and federal statutory provisions.

Under English common law, a judge could be disqualified only if he had a direct pecuniary interest in the outcome of the case. By the twentieth century the situations in which recusal would be justified were broadened to include a "substantial" interest, even if not pecuniary.

Today, under 28 U.S.C. § 455, self-recusal is recognized by the judge and a judge has an affirmative duty to recuse herself if she falls within its purview. It may also be asserted by an accused by motion in the trial court.

Recusal is specifically mandated under Section 455 when a judge individually or a member of her family has a financial interest in the case that would be substantially affected by the outcome of the trial. Recusal is also mandated when a judge or her spouse ... has an interest that could be substantially affected by the outcome of the trial. The failure to recuse constitutes a violation of the due precess right of the accused. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986)

Under § 455 a judge is required to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The standard is based on circumstances as they would appear to the "ubiquitous reasonable person": once the appearance of unfairness or partiality arises, the judge should recuse himself regardless of his personal view concerning his impartiality.

The appearance of impropriety is a basis for disqualification. Not only must the temple of justice be pure, but it must also appear to be pure, and that appearance extends to defendants and the public as well as lawyers and judges. In 1990 a new Code of Judicial Conduct [CJC] was adopted by the ABA to replace the 1972 Code. Canon 2 of the CJA "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."

We submit that Her Honor should have recused herself pretrial when confronted with the information that her husband's law firm was representing the accused co-conspirator Alice Johnson in an unrelated civil case. As a

matter of avoiding the appearance of impropriety and for due process purposes, her disqualification was essential.

Immediately upon finding out about the possible conflict, counsel for the defendant called it to the attention of the Court at sidebar and requested a hearing which was not granted.

CONCLUSION

For the reasons stated above, the Court should grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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